# In the Supreme Court of the United States.

OCTOBER TERM, 1907.

ANTOINE G. STARR, AN INFANT, BY HIS guardian, A. Pearce Tompkins, plaintiff in error,
*v.*
SAMUEL W. CAMPBELL, DEFENDANT IN error.
} No. 132.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

By article 2 of the treaty of September 30, 1854 (10 Stat., 1109), the United States agreed "to set apart and withhold from sale for the use of the Chippewas of Lake Superior," including the La Pointe Band, certain described "tracts of land."

Article 3 of that treaty provided:

> ART. 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed,

> and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, *with such restrictions of the power of alienation as he may see fit to impose.* And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. * * *

The act of February 11, 1901 (31 Stat., 766), entitled "An act providing for allotments of lands in severalty to the Indians of the La Pointe or Bad River Reservation in the State of Wisconsin," provided:

> That with the consent of the Chippewa Indians of Lake Superior, located on the Bad River Reservation, in the State of Wisconsin, to be obtained in such manner as the Secretary of the Interior may direct, the President may allot to each Indian now living and residing on said reservation and entitled to so reside, and who has not heretofore received an allotment, not exceeding eighty acres of land, such allotments to be subject in all respects, *except as to the age and condition of the allottee,* to the provisions of the third article of the treaty with the Chippewas of Lake Superior and the Mississippi concluded September thirtieth, eighteen hundred and fifty-four.

The plaintiff in error, a minor Chippewa, received an allotment and patent therefor pursuant to this act. His patent, which was dated June 29, 1905, provided (Rec., 6):

> Whereas, There has been deposited in the General Land Office of the United States an order bearing date January 6, 1902, from the Secretary of the Interior, accompanied by a schedule with return dated September 27, 1901, from the office of Indian Affairs, containing a list of selections of land for certain Indians of the Bad River Reservation, as contemplated by the treaty concluded September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi whereby it appears that on the first day of October, 1901, the President, in accordance with the provisions of the third article of said treaty, approved the selection of Antoine G. Starr, being the west half of the southwest quarter of section four (4) township forty-six (46), north of range three (3) west, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor-General.
>
> Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the said treaty, the order and return, with schedule aforesaid, have given and granted and by these presents, do give and grant, unto the said Antoine G. Starr, and to his heirs, the said tract above described; *but with the stipulation that said Antoine G. Starr, and his heirs shall not sell, lease, or in any manner alienate said tract without the con-*

*sent of the President of the United States;* to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Antoine G. Starr and to his heirs forever, *Provided, as aforesaid, that Antoine G. Starr and his heirs shall not sell, lease, or in any manner alienate said tract without the consent of the President of the United States of America.*

January 8, 1902 (prior to the issuance of the patent), a contract for the sale of the standing timber upon his allotment was made by Antoine G. Starr with one Justus S. Stearns. (Rec. 7.)

By the terms of said contract the purchase price was to be paid to the Indian agent of the La Pointe Agency in trust for Starr. (Rec. 7.) It was further provided that the contract should be void unless approved by the Commissioner of Indian Affairs. (Rec. 8.)

The contract was subsequently modified in certain respects, and as modified was approved by the Acting Commissioner of Indian Affairs in the following manner (Rec. 8–9) :

> DEPARTMENT OF THE INTERIOR,
> OFFICE OF INDIAN AFFAIRS,
> *May 23, 1903.*
>
> The within contract is hereby approved subject to the regulations approved by the President, December 29, 1902, as herein modified.
>
> M. C. TONER,
> *Acting Commissioner.*

The rules and regulations of the President, approved December 6, 1893, relating to the sale of timber upon the reservation, provided (Rec. 10):

> 7. After deducting one-half of the cost of the scaling and other necessary expenses chargeable against the same the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian agent, to be expended for the relief and benefit of the Indians of the reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation, shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians.

This provision was amended by the President in December, 1902, by adding the following paragraph (Rec. 4):

> If the Indian agent shall in any case be of opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit.

The petition states that the land allotted to the plaintiff in error, "exclusive of the merchantable timber standing thereon, was then and now is of the value of $1,000 and no more."

The petition further states (Rec. 4):

> 6. That between the 27th day of January, 1902, and the 1st day of October, 1905, and prior to the commencement of this action, the said Justus S. Stearns named in said contract entered upon said land and cut and removed therefrom a large amount of standing timber of the value of at least fifteen thousand ($15,000) dollars, which amount was prior to the commencement of this action paid to the said defendant, S. W. Campbell, for the use and benefit of this plaintiff, that of said amount said Campbell has paid to said plaintiff the sum of three thousand one hundred ($3,100) dollars and no more, and there is still in the said Campbell's possession the sum of eleven thousand nine hundred ($11,900) dollars so received by him for this plaintiff.

This suit was instituted for the purpose of compelling the defendant to turn over the balance of the purchase money to the plaintiff or his guardian, the latter having been appointed by the county judge of Ashland County, Wis.

In sustaining the demurrer interposed by Campbell, the Indian agent, to the complaint, Judge Sanborn (after referring to article 3 of the treaty of September 30, 1854) said (Rec. 12):

> By virtue of this provision the President has made rules and regulations concerning the alienation or sale of the standing timber upon the tracts mentioned in the complaint, and from such sale the moneys claimed by the plaintiff were derived. In view of the power

given to the President by the treaty and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department and is held in trust by the United States for the plaintiff's benefit, and that the demurrer interposed to the complaint should be sustained.

## ARGUMENT.

### I.

**The citizenship of plaintiff in error is immaterial.**

This suit seems to have been originally instituted upon the theory that the guardianship exercised by the Government over the property of plaintiff in error was inconsistent with the citizenship conferred upon him by section 6 of the general allotment act of February 8, 1887 (24 Stat., 388).

That conferring citizenship upon an Indian does not necessarily free him from the guardianship of the United States in respect to property granted him by the General Government has been recognized both by this and other Federal courts.

*United States* v. *Rickert*, 188 U. S., 432.
*Matter of Heff*, 197 U. S., 488, 508–9.
*Cherokee Nation* v. *Hitchcock*, 187 U. S., 294, 307–8.
*United States* v. *Thurston Co.*, 143 Fed., 287, Circuit Court of Appeals, Eighth Circuit.
*National Bank of Commerce* v. *Anderson*, 147 Fed., 87, Circuit Court of Appeals, Ninth Circuit.

The last two cases upheld the validity of regulations of the Secretary of the Interior providing for

the deposit and payment to the Indians entitled thereto, in monthly installments of ten dollars each, of the moneys derived from the sale of inherited Indian allotments, the act of May 27, 1902, authorizing the sale of such lands subject to the approval of the Secretary of the Interior.

Section 6 of the general allotment act expressly provides that the privilege of citizenship is conferred "without in any manner impairing *or otherwise affecting* the right of any such Indian to tribal or other property."

In *Hitchcock* v. *U. S. ex rel. Bigboy* (22 App. D. C. 275), Bigboy, also a Chippewa Indian holding an allotment upon the Bad River Reservation, sought to compel the Secretary of the Interior, by mandamus proceedings, to turn over the balance of the purchase price of timber sold from his allotment under a contract similar to that made by plaintiff in error. Reliance was had in that case upon the fact of Bigboy's citizenship, but the Court of Appeals said (p. 284):

> We are unable to see what part the fact of the citizenship of the relator performs in the present case. He might well be a citizen, with all the rights and privileges of citizens, and yet be disqualified from the exercise of absolute ownership over certain specified property. If it be conceded that among the rights of citizenship is that of freely acquiring, holding, and disposing of property, yet it does not follow that the grantor of property may not place re-

strictions upon its use by the grantee or person for whose benefit it is granted.

In the Heff case this court said (197 U. S., 508–9):

> But it is said that the Government has provided that the Indians' title shall not be alienated or encumbered for twenty-five years and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property, but these are mere property rights and do not affect the civil or political status of the allottees. In *United States* v. *Rickert* (188 U. S., 432), we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of State taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) *and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants.* This it may do by appropriate proceedings in either a National or a State court. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands, and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation.

We think it clear, under the decisions cited, that if the restriction upon the alienation of the land author-

ized by the treaty of September 20, 1854, and contained in the patent to plaintiff in error, embraces the sale of the timber on his allotment, the power of the President to make the regulations in question is indisputable.

## II.

### The restriction on alienation embraces the sale of the standing timber.

Prior to the decision of this court in the Paine Lumber Company case (206 U. S., 467), no one seems ever to have thought of questioning that a restriction upon the alienation of land allotted to an Indian included the sale of the standing timber. We will discuss and distinguish that case later.

In *Hitchcock* v. *U. S. ex rel. Bigboy, supra,* which, as stated, was a case similar to this, the Court of Appeals said (22 App. D. C., 286–7):

> It is not controverted that under the treaty of 1854 the President had power to place restrictions upon the alienation of the lands allotted in severalty. He exercised that power by providing that the Indian owners should not sell without his consent. It seems, also, not to be controverted that the restriction extended to the sale of the timber on the land as well as to the land itself. * * *

The lack of controversy on this point was doubtless due to the elementary principle of the common law that standing timber is a part of the realty.

This principle was recognized by the court in *United States* v. *Cook* (19 Wall., 591, 593), where it was said:

> The timber while standing is a part of the realty, and it can only be sold as the land could be. The land can not be sold by the Indians, and consequently the timber, until rightfully severed, can not be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale.

Blackstone says (Bk. 2, p. 18):

> Corporeal hereditaments consist wholly substantial and permanent objects; all of which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke (e), comprehendeth, in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, *woods*, moors, waters, marshes, furzes, and heath. * * *
>
> Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law; upwards, therefore no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the center of the earth, belongs to the owner of the surface (4); as is every day's experience in

> the mining co[illegible]ries. So that the word "land" include[illegible] not only the face of the earth, but everything under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his *woods*, his waters, and his houses, as well as his fields and meadows.

Williams on Real Property (pp. 78–9):

> The methods by which a tenant in fee simple can alienate his estate in his lifetime will be reserved for future consideration, as will also the subject of alienation by testament. As a tenant in fee simple may alienate his estate at his pleasure, so he is under no control in his management of the lands, but may open mines, *cut timber*, and commit waste of all kinds, (z) grant leases of any length, and charge the lands with the payment of money to any amount.

Plaintiff in error says (Brief, p. 18):

> The restriction [on alienation] does not reach the timber. One person may own the "Tract of land," another the standing timber. It would be precisely correct to say that A owned the tract of land and B the timber standing upon it, C having sold the standing timber to B and the tract of land to A.

It is difficult to see how plaintiff in error can logically contend that the restriction on the alienation of the tract of land contained in the patent did not cover the standing timber, when his only title to such timber depends upon the conveyance to him of the land.

In other words, plaintiff in error is placed in the position of contending that while the allotment to him of the tract of *land* described in the patent conveyed title to the timber standing thereon as a part of the land, the restriction on the alienation of the land in the same patent did not cover the timber.

The Executive Department of the Government, charged with the administration of these allotment matters, has always construed the restriction on alienation to embrace the timber on such lands.

It is apparent that both in the treaty of September 30, 1854, and in the patents issued thereunder, the term "alienation" is used in its broadest sense. By the treaty, the President is authorized to impose such restrictions on the power of alienation "as he may see fit," and by the patents it is provided the allottee or his heirs "shall not sell, lease *or in any manner alienate* said tract without the consent of the President of the United States."

The act of February 11, 1901, under which plaintiff in error received his allotment, and which authorized allotments to be made to all Indians upon the Bad River reservation, without regard to age and condition—that is, whether married women or children incapable of managing their own affairs—would, is fair to say, never have been passed if it had been supposed that the long-continued practical construction of the provision respecting alienation was likely to be overthrown.

In reporting this bill to the House, and recommending its passage, the Committee on Indian Affairs said (House Report No. 2465, 56th Cong., 2nd sess.):

> The passage of this bill is recommended by the United States Indian agent in charge of the Indians, the Acting Commissioner of Indian Affairs, Mr. Tanner, and the Secretary of the Interior.

The proceedings in the Senate were as follows (33 Cong., Rec. 3966):

> Mr. QUARLES. I ask unanimous consent for the present consideration of Order of Business 890, being Senate bill 3901. It is a measure against which there is no objection, to provide for the allotments of lands in severalty to the Indians in one of the Wisconsin reservations. It has been recommended by the Indian Bureau and unanimously recommended by the Committee on Indian Affairs.
>
> There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill (S. 3901) providing for allotments of lands in severalty to the Indians of the La Pointe or Bad River Reservation in the State of Wisconsin.
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> The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

In the House (34 Cong., Rec. 1815):

> Mr. STEWART of Wisconsin. I ask unanimous consent for the present consideration of the bill (S. 3901) providing for allotments of

lands in severalty to the Indians of the La Pointe or Bad River Reservation, in the State of Wisconsin.

The bill was read as follows:

* * * * *

Mr. RICHARDSON of Tennessee. Has this bill been unanimously reported from the Committee on Indian Affairs?

Mr. STEWART of Wisconsin. It has.

Mr. RICHARDSON of Tennessee. Has it been submitted to the Department?

Mr. STEWART of Wisconsin. It has been.

Mr. RICHARDSON of Tennessee. And recommended by the Secretary of the Interior?

Mr. STEWART of Wisconsin. It is a Department measure entirely; the Secretary has asked that it go through. The report of the committee is here.

Mr. RICHARDSON of Tennessee. If the bill has been recommended by the Department and is unanimously reported by the committee——

Mr. STEWART of Wisconsin. It is.

Mr. RICHARDSON of Tennessee. Then I have no objection.

There being no objection the House proceeded to the consideration of the bill; which was ordered to a third reading, read the third time, and passed.

On motion of Mr. Stewart of Wisconsin, a motion to reconsider the vote by which the bill was passed was laid on the table.

The annual report to Congress of the Secretary of the Interior for 1900, included a report from the In-

dian Agent for the La Pointe Agency, in which it was stated (Ann. Rep., Dept. of Interior, 1900, p. 409):

> *Allotments.*—During the past fiscal year 135 patents for Bad River Indians, 152 patents in favor of Lac du Flambeau Indians, and 1 patent in favor of a Red Cliff Indian have been received at this agency, all covering allotments of land taken on the reservation to which the patentee belongs. These patents were for allotments contained on schedules forwarded for Department approval more than two years ago.
>
> No new lists of allotments have been proposed during the past year. A bill looking to the allotting of land to married women and minor children of the Bad River Reservation is before Congress at the present time, and it is expected that favorable action will be taken in the matter, *thus enabling these Indians to acquire much needed land and dispose of the timber thereon to their advantage.*

The conditions which prompted the issuance of the regulations approved December 6, 1893, in regard to the sale of timber upon the Bad River Reservation to Justus S. Stearns, set forth in the Record (p. 9), are stated in the Report of the Commissioner of Indian Affairs for 1894 (pp. 57–59), as follows:

> *Bad River Reservation, Wis.*—Until recently the condition of the Chippewas on the Bad River Reservation was as deplorable as that of the Lac du Flambeau Chippewas prior to

the granting of authority for the sale of their timber to Messrs. Cushway & Co. October 18, 1893, Lieutenant Mercer, acting agent, transmitted to this office a petition numerously signed by the Indians of the Bad River Reservation, praying that a proposition made to them by J. S. Stearns, for the purchase of the timber on their respective allotments, and the dead timber standing or fallen on the unallotted lands of their reservation, be accepted by the Government, the prices offered being considered both by Lieutenant Mercer and the Indians as very advantageous.

* * * * *

Acting Agent Mercer stated that there were undoubtedly 50,000,000 feet of timber on the reservation that had recently been burned, and a great amount of other dead timber, such as windfalls, the greater part of which if left uncut and out of water would not pay the cost of removal; also that the Indians on the reservation were practically without work, and most of them without provisions to carry them through the winter, and that the prices offered by Mr. Stearns were very much higher than those offered by a number of other lumber dealers in the vicinity of the reservation to whom he had applied. This office therefore reported to the Department that if the Department should conclude to make additional allotments to the Indians on the Bad River and Lac du Flambeau reservations, as recommended in office reports of May 25, June 13, and July 5, 1893, the proposal made by Mr. Stearns to purchase the timber of the

Bad River Indians would be prepared for submission to the President.

* * * * *

November 18, 1893, the office submitted a statement relative to Mr. Stearns's proposition, and a draft of rules and regulations to govern the sale of timber in accordance therewith, and recommended that the President be requested to authorize the sale of timber on the allotted and unallotted lands of the reservation by approving said rules and regulations, which were substantially the same as those under which the Lac du Flambeau logging was being done.

The President granted the required authority, and Mr. Stearns filed his bond for $50,000, which was approved by the Department January 12, 1894, and Acting Agent Mercer was directed January 18, 1894, to permit him to begin operations, and to see that the rules and regulations were strictly complied with by all parties concerned in the cutting and manufacture of timber on the Bad River Reservation. He was also notified that the office regarded it important that the Indians should be assisted and advised in the matter of their contracts by some one familiar with the value of timber and with timber operations, and he was therefore directed to thoroughly supervise the making of the contract himself, or to designate one of his employees who was familiar with logging operations and the value of timber, to assist the Indians in making their contracts and to see that the prices agreed upon were reasonable and fair.

> March 9, 1894, the President approved a list of 38 new allotments to the Indians of the Bad River Reservation, and March 22, 1894, the office recommended that the President authorize the sale to Mr. Stearns of the timber on these 38 new allotments under the regulations, and at the prices named in the authority of December 6, 1893. April 4, 1894, the President granted the authority requested, and Mr. Stearns has filed a stipulation executed by himself and the City Trust Safe Deposit and Surety Company of Philadelphia (his surety on his original bond) extending the stipulations of that bond to cover his operations under the new authority.
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> One hundred and sixty-eight contracts have been entered into between Mr. Stearns and the Indian allottees, and it is understood that he is actively engaged in the erection of his plant for logging and for the manufacture of lumber.
>
> So far as this office has been advised his operations on the Bad River Reservation have been to the entire satisfaction of the agent and for the benefit of the Indians.

In the Report of the Commissioner of Indian Affairs, dated September 14, 1895 (Ann. Rep. Secretary of Interior, 1695, vol. 2, pp. 50–51), referring to the Lac Court d'Oreilles Reservation, Wisconsin, one of those established under the Chippewa treaty of September 20, 1854, the Commissioner said:

> This reservation was at one time considered as embracing one of the most extensively timbered tracts in northern Wisconsin. The timber was not only plentiful but also of the

finest quality. Between the years 1882 and 1889, however, the reservation was practically denuded of its timber, and the money paid therefor to the Indian allottees was squandered in gambling and other extravagances. Over 300,000,000 feet of timber was taken from the reservation during the years named, and, except that four or five of the Indians have built nice houses and are in comparatively comfortable circumstances, the Indians have nothing to show for their days of prosperity.

This fact is due largely to the system under which the timber on the various reservations of the La Pointe Agency was permitted to be sold and the logging operations to be conducted. On each reservation were a number of lumber firms, each firm wanting, of course, to obtain the best timber; and each seems to have gone systematically to work to hoodwink or debauch the Indian allottees in order to secure their good will and timber. In many instances an allottee would make a contract to sell his timber to two or more, even as high as five, different firms, when there would be a long and bitter fight between the lumber men to determine who should have it. Indeed, on the Bad River Reservation at one time the logging camps are said to have resembled the encampment of an army. Armed forces were maintained by the firm in possession of a certain body of timber to prevent encroachments by the forces of other lumber men who claimed a better right thereto. The Indian was mostly

paid for his timber in merchandise (each lumber firm had a store on the reservation), on which the lumberman made a good profit. Some were paid large sums of money, which would be squandered in one night in gambling and drink.

The system now in operation under this agency is different. The office has decided upon the policy of allowing only one logger on each reservation. The lumberman is required to pay for the timber in cash to the agent, and the Indian is permitted to have money to be used only for proper purposes, such as building a house on his allotment or otherwise improving his land to adapt it for agricultural use, and when his check is honored the farmer on the reservation is required to see that he spends the money for the purpose designated. Under this system many of the Indians on the Lac du Flambeau Reservation, where logging has been going on the longest, have built very comfortable houses on their allotments, and all have warm clothing to protect them in the bitter winters of that region and plenty to eat all the year round.

It seems fair to say that, as Congress had been repeatedly advised by the reports of the Interior Department of the conditions as to "logging" upon the Bad River and other reservations in Wisconsin, it is both the legislative and executive construction of the treaty of September 30, 1854, with the Chippewas, that the restriction upon alienation covered the timber upon such lands.

The understanding of Congress that a restriction upon alienation extends to the timber on an Indian allotment appears from various acts authorizing the cutting and sale of such timber by Indians holding timber lands.

The act of February 12, 1901 (31 Stat., 785), provided:

> That the Indians on the Grand Portage Indian Reservation, in the State of Minnesota, shall be, and they are hereby, permitted to cut and dispose of the timber on their several allotments, under such rules and regulations as may be prescribed by the Secretary of the Interior.

The act of April 21, 1904 (33 Stat., 189, 209–210), provided:

> The Chippewa Indians of the State of Minnesota to whom allotments have been or shall hereafter be made, and trust or other patents, containing restrictions upon alienation issued or which shall hereafter be issued therefor, are, with the consent of the Secretary of the Interior and under such rules and regulations as he may prescribe, hereby authorized to dispose of the timber on their respective allotments. Timber on the allotments of minors may likewise be so sold by the father, mother, or Indian agent or other officer in charge, in the order named, and the Secretary of the Interior shall make such regulations for the disposition of the proceeds of said sales as may be necessary to protect the interests of said Indians, including such minors.

The second clause of the provision last quoted is an adoption by Congress of the practice of the President with respect to the Chippewas of Lake Superior.

We do not think the language or doctrine of the Paine Lumber Company case should be extended so as to cover this case. That case may be rested upon the proposition there stated that, as the land was not the property of the United States, the timber when cut did not become the property of the United States; hence the United States could not be allowed to recover over the value of the timber from a bona fide purchaser who had paid the purchase price therefor to the allottee.

Moreover, in the Paine Lumber Company case, as the court observed, the treaty there in question contemplated that the allotments should be made of "arable" land, and as there stated, "arable land is of no use until the timber is cut off." Here, the grant was of timber land.

So, also, in the Paine Lumber Company case, there was a bare restriction on alienation, which it was permissible to interpret according to the character of the land granted and the uses to which it could be put. Here, the President was authorized to impose any restrictions upon the alienation of the land that he might deem proper; he put into the patent the broadest possible restrictions, and the character of the land renders it imperative for the welfare of the allottee that the restrictions should extend to the timber. If they do not they are practically valueless.

If it be held in this case that the restriction upon alienation does not prevent the allottee from selling the timber on his allotment, we will have the case presented of a minor Indian being able to dispose of his allotment to the extent of over fifteen-sixteenths of its value without the consent of the President, as the petition states that the land without the timber is worth only $1,000, while the timber already cut therefrom was sold for $15,000.

We also respectfully submit, in view of what was said in the opinion in the Paine Lumber Company case, that there is a plain distinction between cutting timber for purposes of cultivation and use, and selling it as in this case. The situation thus presented seems to us no more difficult of solution than that which arises where the question is whether waste has been committed by one who is not a tenant in fee.

Williams on Real Property (p. 23):

> Every tenant for life, unless restrained by covenant or agreement, has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences, (1) and also the right to cut underwood and lop pollards in due course. (*m*) But he is not allowed to cut timber or to commit any other kind of *waste;* (*n*) either by voluntary destruction of any part of the premises, which is called *voluntary* waste, or by permitting the buildings to go to ruin, which is called *permissive* waste.

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In a note to this paragraph it is stated (id., p. 23):

> While the principles of the law of waste are the same in the United States as in England, yet the application of them is accommodated to the peculiar circumstances and condition of land in this country. The change of arable land to meadow, etc., is not therefore waste in ordinary cases, and it has been generally held that a tenant for life of wild land may cut down timber for the purpose of clearing and cultivating a reasonable portion of the land, regard being had to the location and condition of the whole farm, the value of the timber, and the course of good husbandry. (*Wilkinson* v. *Wilkinson*, 59 Wis., 557; *Stout* v. *Dunning*, 72 Ind., 343.) What is waste in such cases is a question for a jury, to be determined by the usage and practice of the country. But such tenant may not cut down all the timber, or so much of it as will permanently damage the inheritance. (*Morehouse* v. *Cotheal*, 2 Zab., 521; *Keeler* v. *Eastman*, 11 Vt., 293; *McCullough* v. *Irvine's Exrs.*, 1 Harris, 438; *Jackson et al.* v. *Brownson*, 7 Johns., 227; *Ward* v. *Sheppard*, 2 Hayw., 283; *Woodward* v. *Gates*, 38 Ga., 212; *Drown* v. *Smith*, 52 Me., 141; *McCay* v. *Wait*, 51 Barb., 141.) He may sell the timber to repay himself the expense of clearing, but if valuable trees be cut for sale, and not for the purpose of cultivating the land, it is waste. (*Davis* v. *Gillian*, 5 Iredell Eq., 308, 311.)

In *United States* v. *Cook*, the court said (19 Wall., 593):

> This right of use and occupancy by the

Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

## III.

**Power of the President to control the disposition of the proceeds of timber sold.**

Assuming that the sale of the timber would be an alienation of the land within the meaning of the treaty of September 30, 1854, and the patents issued thereunder, and that such timber could not therefore be sold without his consent, it would seem needless to argue that the President, as a condition of his consent, might make any proper regulation with regard to the disposition of the proceeds thereof that the welfare of the allottee may appear to him to require.

In *United States* v. *Thurston Co.*, 143 Fed., 287, in discussing the power of the Secretary of the Interior to control the disposition of moneys derived from

the sale of inherited Indian allotments, by regulations similar to those here in question, which sales could only be made with his approval, the Circuit Court of Appeals for the Eighth Circuit said (p. 291):

> Nor is the complainant without lawful authority to hold these proceeds and to control their disposition in the same way that it held and controlled the lands in trust for the benefit of these Indian heirs. The act of 1902 authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secretary of the Interior. It thereby vested in the Secretary plenary power to permit or to forbid the sales proposed. The whole is greater than any of its parts, and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the power to consider and determine the terms and conditions on which such sales should be approved. By rules and regulations approved October 4, 1902, and amended September 16, 1904, and May 25, 1905, the Secretary provided that owners of inherited Indian lands might be permitted to sell them on condition that they agreed that the proceeds of such lands should be placed in one or more banks, which should furnish satisfactory bonds to guaranty the safety of the deposits, to the credit of each heir in proper proportion, subject to the checks of such heirs only when approved by the agent or officer in charge for amounts not exceeding $10 to each in any one month, and subject to their checks for larger amounts

> only when approved by the agent specifically authorized by the Commissioner of Indian Affairs. The acts of Congress authorized the Secretary to make these regulations for the purpose of carrying into effect the act of 1902, and, when made, they had the force of statutory enactments. Rev. Stat., secs. 441, 465 (U. S. Comp. St., 1901, pp. 252, 264); *U. S.* v. *Eaton*, 144 U. S., 688; *Wilkins* v. *U. S.*, 96 Fed., 837. The Indians whose rights are under consideration made the sales of their lands subject to the conditions prescribed by these rules. * * *

In *National Bank of Commerce* v. *Anderson*, 147 Fed., 87, the Circuit Court of Appeals for the Ninth Circuit reached a like conclusion in respect to the same matter.

In the present case the timber was sold under a contract entered into by both parties, subject to the regulations of the President in respect to the disposition of the proceeds, and it would seem that Starr was estopped from contesting their validity while seeking the benefit of the contract in all other respects.

While the contract of a minor is voidable, it is well settled that he can not seek to retain the benefit of a contract and at the same time escape its obligations.

We deem it unnecessary to argue the proposition that, if the restriction on alienation covers the sale of the timber, the guardian of Starr appointed under the authority of the State court can not interfere with any regulation in respect thereto which the

President is authorized to make. The Constitution and the laws made in pursuance thereof are supreme, and it is well settled that a regulation of the executive department of the Government authorized by law has all the force of law.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

HENRY M. HOYT,
*Solicitor General.*

O

# In the Supreme Court of the United States.

OCTOBER TERM, 1907.

ANTOINE G. STARR, an infant, by A. Pearce TOMKINS, his guardian,
Plaintiff in error,
vs.
SAMUEL W. CAMPBELL,
Defendant in error.
No. 132.

**IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.**

This court having granted to us, as counsel for the Red Cliff Lumber Company in other pending litigation involving similar questions, permission to submit a brief in this suit as *amici curiae*, we respectfully present the following:

This is an action at law for the recovery of money alleged to have been received by defendant in error, who is the United States Indian Agent for the La Pointe Agency, in Wisconsin, to the use of plaintiff in error who is an Indian. The plaintiff in error, who was the plaintiff below, is an infant, and the action is prosecuted in his behalf by his guardian ad litem (who is as well the general guardian appointed by the County Court of Ashland County, Wisconsin.)

To the complaint the defendant addressed a demurrer on the ground of insufficient facts, and on a hearing,

the demurrer was sustained and judgment entered dismissing the complaint, from which the plaintiff prosecutes this writ for the correction of alleged errors.

Taking the complaint as true, as we must, it states the following,

## FACTS.

The plaintiff in error is an Indian, a member of the Bad River Band of the Chippewas of Lake Superior, and has been allotted, by the United States, eighty acres of land in the Bad River or La Pointe Reservation in Wisconsin, for which he received a patent June 9th, 1905, by virtue of Article 3 of the Treaty of September 30th, 1854, between the United States and the Chippewas of Lake Superior and the Mississippi, (Printed record ,page 4) and the Act of Congress of February 11th, 1901, to which a more extended reference is hereinafter made.

The patent granting the allotted lands contains the stipulation that the plaintiff in error "and his heirs shall not sell, lease or in any manner alienate said tract without the consent of the President of the United States," (Printed Record, Page 6.)

That the allotted lands were chiefly valuable for the timber thereon.

By rules and regulations promulgated by the President of the United States December 6th, 1893, (Printed Record Pages 9-10-11) all the Indians of said Reservation receiving allotments and patents therefor were authorized to sell by contracts to be entered into all the timber standing or fallen on their respective allotments, to one Justus S. Stearns at a stipulated price; and it was provided further that the proceeds of such timber, less certain deductions, should be deposited in some national bank subject to withdrawal by check of the Indian allottees, countersigned by the Indian Agent, unless otherwise stipulated in contracts with particular Indians.

A contract was entered into, dated January 8th, 1902, between plaintiff in error and said Stearns, wherein the plaintiff in error sold and said Stearns purchased, and agreed to cut and remove, the timber on said allotment (Printed Record Pages 7-8-9;) and it was expressly provided therein that said Stearns would pay "to the United States Indian Agent for the La Pointe Agency in trust" for the plaintiff in error for all such timber so cut, the agreed contract price per thousand feet. The contract was approved May 23d, 1903, by the Commissioner of Indian Affairs on the condition annexed by him, (Printed Record Pages 8-9) and accepted by said Stearns that the purchaser should so pay "to the United States Indian Agent at the La Pointe Agency in trust for the party of the first part" (Plaintiff in error) for such timber, rates substantially higher than those named in the contract; subject, however, to the amendment of the rule or regulation 7 made by the President, which is as follows:

> "If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit." (Printed Record Page 4, where set out in complaint.)

That said Stearns entered upon said lands and cut and removed therefrom timber of the value of Fifteen Thousand Dollars ($15,000.00,) which sum was paid to defendant in error as the United States Indian Agent of the La Pointe Agency for the use of plaintiff in error in trust as provided. Of this sum plaintiff in error has been paid Thirty One Hundred Dollars ($3,100.00,) and the balance, Eleven Thousand Nine Hundred Dollars ($11,900.00,) the defendant in error as such Indian Agent still holds and refuses, upon demand, to pay to plaintiff in error other than in instalments of Ten Dollars (10.00)

per month as instructed by the Commissioner of Indian Affairs.

That such refusal is based upon the above quoted amendment of rule 7 and appears to be an exercise of the discretion reposed by such amended rule or regulation, in the Indian Agent and Commissioner of Indian Affairs.

That prior to the amendment of Rule 7, it was the established custon and practice of the Indian Agent of said Agency to pay to allottees under such or similar contracts the amounts payable thereunder as fast as demanded by the allottees without interference or control of the Indian Agent or Commissioner of Indian Affairs.

It is also alleged, as a fact, though it partakes more of the nature of argument and is the ultimate point to be determined, that it is not within the scope of the authority of the Commissioner of Indian Affairs to interfere with or control the disposal of the moneys so received and held by the Indian Agent; and that the general guardian of plaintiff in error appointed under the laws of Wisconsin, is the proper person to determine how much shall be paid to and expended for plaintiff in error.

That plaintiff in error has by reason of the refusal of defendant in error to pay said money or countersign a check therefor, been damaged in the sum of Eleven Thousand Nine Hundred Dollars ($11,900.00.)

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The plaintiff in error makes the following:

## ASSIGNMENT OF ERRORS.

### I.

The court erred in sustaining the defendant's demurrer to the plaintiff's complaint herein.

### II.

The court erred in entering judgment in favor of the defendant and against the plaintiff.

THE CONTENTIONS OF PLAINTIFF IN ERROR ARE:

I.

That he is an Indian allottee and as such is a citizen of the United States and, perforce, of Wisconsin by virtue of the Act of Congress of February 8th, 1887, (24 Stats. at L. 389.)

II.

That as such citizen plaintiff in error is entitled to "the benefit of" the laws of the State of Wisconsin and of "the rights, privileges and immunities" of citizens of the United States.

III.

That the said Act conferring citizenship upon Indian allottees *ipso facto* emancipated the Indians from Federal control and guardianship theretofore existing, not only as respects the control of the person of the Indians but the control of their property derived from the United States as well.

IV.

That the continued exercise of control of the Federal government, after such enactment, over the property of the plaintiff in error derived from the United States, abridges and violates the "rights, privileges and immunities" guaranteed to him as a citizen of the United States and denies to him the equality of those "rights, privileges and immunities" of citizens and the "benefit" of the laws of Wisconsin.

V.

That one of the rights and privileges of such an infant citizen is to have a properly constituted guardian, who shall be charged with the control of either his person or his property or both, as the circumstances require.

VI.

That he has such guardian of his property, appointed by a court of competent jurisdiction in Wisconsin, but that his rights so derived have been infringed in this, that defendant in error, who has received certain moneys for his use and benefit, refuses to pay the same on demand to his general guardian.

VII.

That his general guardian is alone the proper person to have the custody and control of said funds for plain tiff's benefit.

VIII

That the title of plaintiff in error to his allotment is in fee simple, subject only to the restrictions imposed on alienation without the consent of the President.

IX.

That when the President has consented to the sale of the timber on the allotment of plaintiff in error the authority of the President over the subject matter has ceased; and that the officials of the Department of the Interior have no lawful authority to interfere with the disposal of the proceeds from the sale of said timber.

X.

That the conditions annexed by the President to his consent given to the sale of the timber on the allotment of plaintiff in error, were wholly unauthorized and without force.

ON THE OTHER HAND THE CONTENTIONS OF THE DEFENDANT IN ERROR ARE:

I.

That it was competent for the United States to secure to plaintiff in error the title to the lands in question

out of the public domain, and the proceeds to be derived therefrom, in the manner adopted.

II.

That the Act of Congress of 1887, (24 Stat.at L.389) fixed and determined only the civil and political status of plaintiff in error; and may have been in a measure an emancipation of Federal control of his person.

III.

That notwithstanding plaintiff in error may be a "citizen "of the United States and of Wisconsin, he is none the less an Indian and, as such, still is the ward of the Federal government so far as his property, derived from it, is concerned, and so remains until the Federal government relinquishes or abandons its guardianship.

IV.

That the United States has at all times exercised and still exercises its guardianship and control of the property of plaintiff in error, as over that of other Indians derived from it; and that such control has never been abandoned nor relinquished.

V.

That the action of the President in imposing the restriction on alienation in the patent of plaintiff in error, contemplated by the Treaty of 1854,—that the consent given by the President to the sale of the timber on the allotted lands in the Bad River Reservation, on certain terms and conditions prescribed,—that the promulgation by the President of rules and regulations and the subsequent modification of Rule 7 thereof, for the sale and manufacture of such timber and the receipt and control of the

proceeds thereof,—and that all the acts and doings in the premises of the officials of the Department of the Interior, including the action of the defendant in error in refusing the demand of the plaintiff in error, were severally acts done in exercise of that guardianship or trusteeship or control over the property of Indians, which the Federal government has consistently and uniformly maintained.

VI.

That the purpose of the restriction on alienation contemplated by the Treaty and imposed in the patents issued pursuant thereto, was to reserve control and supervision by the Federal government over the Indians' property.

VII.

That the Act of Congress approved February 11th, 1901, (31 Stats. at Large P. 766) is the latest expression of the legislative power respecting the relations between the Federal government and the band of Indians of which plaintiff in error is a member.

VIII.

That by that Act Congress recognized the control and supervision of the executive department over the property granted to plaintiff in error.

IX.

That no "right" strictly speaking, of plaintiff in error has been denied to him.

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## ARGUMENT.

It is necessary to consider the Treaty of 1854 and the acts of the President in execution of the power con-

ferred upon him thereby, the legislation enacted bearing thereon, as well as the consequent acts of the executive department and the parties hereto.

THE TREATY OF 1854. (10 STATS. AT L. 1109)

The Treaty was concluded September 30th, 1854 between Henry C. Gilbert and David B. Herriman, Commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, and was ratified and confirmed by the Senate January 10th, 1855.

By the terms of Article 1, the Chippewas of Lake Superior and the Mississippi cede to the United States all lands owned by them in common lying East of a certain boundary line drawn through what is now the State of Minnesota, dividing the Indian country of the Chippewas of Lake Superior from that of the Chippewas of the Mississippi, and which ceded lands include the lands afterward reserved in said Treaty for the several bands of the Chippewas of Lake Superior.

By the terms of Article 2, provision is made for the several bands, and so much thereof as concerns this discussion is as follows:

> "Article 2. The United States agree to set apart and withhold from sale for the use of the Chippewas of Lake Superior the following described tracts of land, viz: * * * *
>
> "For the La Pointe Band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the centre of township forty seven north, thence west to the west line of said township, thence south to the south east corner of township forty-six north, range thirty -two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore and thence along

the lake shore, crossing Shag-waw-e-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground."

By Article 3 under which the title and rights of plaintiff in error are derived, it was provided as follows:

"The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President, may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The remainder of the Treaty contains provisions for certain payments and annuities on the part of the United States and the welfare of the Chippewas of Lake Superior, and are not involved in this discussion.

## THE ACTS OF THE PRESIDENT AND CONGRESS IN OBSERVANCE OF THE TREATY.

The boundaries of the lands so reserved for the benefit of the La Pointe band of which the plaintiff in error

is a member, were thereafter defined and the lands surveyed, and such reservation became known as the "Bad River Reservation."

Pursuant to said Treaty the President from time to time assigned to members of said La Pointe band, lands on the Reservation as contemplated by Article 3 of the Treaty, and by general order imposed a restriction on alienation of the assigned parcels to be inserted in all the patents to issue therefor, in the words of the patent of plaintiff in error contained (Printed Record Page 6,) which restriction is that the patentee "*and his heirs shall not sell, lease or in any manner alienate said tract without the consent of the President of the United States.*"

By Act of Congress passed and approved February 11th, 1901, Chapter 350 (31 Stats. at L. 766) it was enacted,—

> "That with the consent of the Chippewa Indians of Lake Superior, located on the Bad River Reservation in the State of Wisconsin to be obtained in such manner as the Secretary of the Interior may direct, the President may allot to each Indian now living and residing on said Reservation and entitled to so reside and who has not heretofore received an allotment, not exceeding eighty acres of land, such allotments to be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third Article of the Treaty with the Chippewas of Lake Superior and the Mississippi, concluded September 30th, 1854.

By virtue of said act and said treaty the selection of plaintiff in error of the lands in the complaint herein described was approved October 1st, 1901, and said lands conveyed to him by patent. (See patent in Printed Record page 6.)

By rules and regulations approved by the President December 6th, 1893, and duly promulgated (Printed Record pages 9-10-11) the consent of the President was given for the sale and the sale authorised, by the Indians

af the Bad River or La Pointe Reservation of the timber standing or being on their respective allotments unto one Justus S. Stearns, under the supervision of the United States Indian Agent for the La Pointe Agency, at certain specified minimum prices to be paid therefor; conditioned, however, upon contracts of a form to be prescribed by the Commissioner of Indian Affairs, being entered into with said Stearns by such of the Indian allottees as desired to sell their timber, which should have force only when approved by the Commissioner of Indian affairs, and "which approval shall operate as specific consent of the executive to the sale of the timber to which the contract relates". (Regulation 2. Printed Record P. 10.)

The regulations provide that said Stearns should establish a mill on the Reservation for the manufacture of said timber into lumber and shingles, and that he give a bond conditioned for the observance of the laws of the of the United States, and performance of the stipulations of the contract etc., and it was further provided therein that;

> 3. "The Indian Agent for the La Pointe Agency, Wisconsin, shall see that the said Justus S. Stearns shall employ Indians in the cutting, moving and manufacturing of timber when practicable, on the same terms as other labor, and said Justus S. Stearns shall agree to employ Indians who may be willing to work in doing the logging authorized hereby."

By the regulations provision was also made for the cutting of timber on the unallotted lands on the Reservation, which does not concern this discussion.

By regulation 7 it was provided as follows: (Printed Record P. 10)

> 7. "After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian Agent, to be

expended for the relief and benefit of the Indians of the Reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians."

This regulation was afterwards amended or modified December 29th, 1902 by the President's order as alleged in the complaint (Paragraph 5 of Complaint. Printed Record Page 4) by adding thereto the following,—

"If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit."

Regulation 8 is as follows: (Printed Record P. 11)

8. "The farmer in charge of the reservation shall, under the direction of the Agent, be required to supervise the logging on the reservation under these regulations, to the end that no injustice is done the Indians, and no green or growing timber is cut and removed except in accordance with with these regulations, and all moneys for stumpage shall be paid to him or the Agent, in trust for the Indians or Indian owner, to be by him deposited or accounted for according to the foregoing regulations, unless otherwise stipulated in the contract with such Indian owner."

A contract in writing was entered into bearing date January 8th, 1902, between the plaintiff in error and said Justus S. Stearns (Printed Record Pages 7-8-9) whereby plaintiff in error agreed to sell and said Stearns agreed to purchase the merchantable timber of certain specified kinds at certain prices to be paid therefor by said Stearns "*to the United States Indian Agent for the La*

*Pointe Agency in trust for said party of the first part"* (plaintiff in error) (Printed Record Page 7.) This contract was afterward enlarged and modified in this, that said Stearns subsequentlly agreed in writing to pay for said timber prices substantially higher *"To the United States Indian Agent at the LaPointe Agency in trust for said party of the first part"* (plaintiff in error) (Printed Record Page 8) in consideration of the approval of said contract by the Commissioner of Indian Affairs; and thereupon May 23rd, 1903, the said contract as modified was approved by the Commissioner of Indian Affairs "subject to the regulations approved by the President December 29th, 1902" (Printed Record page 9.)

## A DISCUSSION OF THE QUESTION PURELY AS ONE OF TITLE, AND THE POWER OF CONGRESS OVER THE SUBJECT MATTER.

It can hardly be questioned that the title of plaintiff in error granted by the patent is in fee simple, subject, however, to the restrictions imposed on alienation.

Nor can it be questioned that the United States has the power to grant these lands in the manner adopted.

Art. 4 Sec. 3 Sub. 2 U. S. Const.

which is "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." * * * *

Having this power it must follow that it likewise had the power to remove the restriction on alienation on such conditions or terms as it might prescribe, as in this case, on the condition that the purchase money for the timber of plaintiff in error shall be paid to the Indian Agent having supervision of the Bad River Reservation and held in trust for him and with authority to such Indian Agent to pay therefrom to plaintiff in error, who is a minor and presumably incompetent, only the sum of Ten Dollars (10.00) per month.

The allotment of plaintiff in error was obtained by virtue of said Treaty upon the specific authority, however, of the Act of Congress of 1901, supra, wherein provision was made for "such allotments to be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third article of the Treaty with the Chippewas of Lake Superior and the Mississippi concluded September 30th, 1854." And one of the provisions of that article of the Treaty was that patents may issue to the allottees "with such restrictions of the power of alienation as he (the President) may see fit to impose."

Apart from all considerations of the policy of the Federal government or the reason for reposing an authority or discretion in the President as to what restrictions should be placed on an allottee in the patent securing to him his title, it would seem that the action of the President in the exercise of that authority or discretion could not be subject to review by the courts. The authority or discretion vested in the President by the Treaty to to impose "such restrictions of the power of alienation as he may see fit" is a broad one. If not expressly authorized it is necessarily implied that in a given case the President may make a certain restriction and in another case he may add other or make different restrictions. And it must follow that when the restriction imposed by the President is made to depend or turn upon giving his consent to a proposed sale, lease or manner of alienation, that that consent may be withheld or it may be granted with or without a condition annexed;

The United States Circuit Court of Appeals of the Eighth Circuit in the case of the United States vs. the County of Thurston (143 Fed. Rep. 287 C. C. A.) said where a similar question was involved.

> "The Act of 1902 authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secre-

> tary of the Interior. *It thereby vested in the Secretary plenary power to permit or to forbid the sales proposed. The whole is greater than any of its parts and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the power to consider and determine the terms and conditions on which such sales should be approved.*" (italics ours)

Such consent when or how or upon what condition, obtained necessarily relates back to the origin of the title, which is to say the Treaty, as the foundation of the right and title of plaintiff in error, and supplies the element otherwise lacking.

The judgment and discretion reposed in the President by the Treaty did not stop with a restriction on alienation but was extended to cover the disposition of the lands in case of the death of the allottee or in case of its abandonment.

See Article 3 of the Treaty where it is provided, "and he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same or in case of its abandonment by them."

Thus, it will be seen that this discretion is not only broad as respects the action the President may take in granting or withholding his consent to alienation so far as different Indians are concerned, but it is broad in this, that it embraces practically all the conditions and circumstances that may arise respecting the title of the Indian and his relations thereto; that is to say, it covers alienation and encumbrance on the part of the Indian, and it covers the question of its disposition after his death, and it covers the question of its abandonment.

In this connection it is not amiss to say that the authority given the President by the Treaty partakes of the nature of a collateral power of revocation and appointment at common law, where the person or class of

persons to be vested or divested of an estate, or the duration of the estate to be enjoyed, was made to depend upon the will of a given person. Whatever character may be given to the restriction it still remains an element, an inherent quality or qualification, of the title of plaintiff in error and in some measure affects, or limits, or may determine the enjoyment of his estate, the reasons for which will be discussed later.

The plaintiff in error urges that he has a general guardian duly appointed by the County Court of Ashland County, Wisconsin, having jurisdiction of the person and property of plaintiff in error, and that such guardian is the proper party to determine how much shall be paid to and expended for plaintiff in error. This is but saying that the county court is vested with the administration, control and disposal of all his property including that involved herein, for the guardian, its appointee, can only proceed in the matter when specifically licensed and authorized thereto, and for his acts in the premises he must account to that court and receive its confirmation. In answer we call attention to the constitutional provision, supra, and to Article 6 Sub. 2 U. S. Const.

> "This constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It was further provided by Congress in the Act establishing the Territorial Government of Wisconsin (5 Stats. at L. 10)

> "* * * * * * that nothing in this act contained shall be construed to * * * * * * impair or anywise affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property or other rights by treaty or law, or other-

> wise, which it would have been competent to the government to make if this act had never been passed" * * * * * *.

By Section 7 of the Act enabling the Territory of Wisconsin to form a state government (9 Stats. at L. 56) it was provided,

> "That the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States * * * *. Subd. 5. * * *. That the foregoing propositions herein offered are on the condition that the said convention, which shall form the constitution of said State, shall provide by a clause in said constitution or an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof" * * * * *.

And by the constitution of Wisconsin (Art. 2 Sec. 2) (Wis. Stats. 1898 P. 76.) The propositions contained in said act were accepted as follows:

> "It is hereby ordained that this state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof * * * * *".

And we urge that the United States has granted to plaintiff in error the lands in question and has seen fit to attach to such grant a restriction of his power of alienation thereof without the consent of the President of the United States; that the consent of the President has been obtained for the sale of the timber on the lands of plaintiff in error, conditioned upon its being made in

a particular way and the proceeds being disposed of for the ultimate benefit of plaintiff in error in a particular manner; consequently that the County Court of Wisconsin in seeking, taking or assuming by itself, or through its appointee, jurisdiction of these lands of plaintiff in error or of the fund into which the United States may have so caused the lands to be transformed, interferes with the method adopted by the United States in disposing of said lands of plaintiff in error; and that a judgment or decree of that court controlling or disposing of said lands or of the fund derived therefrom by the United States must embarass, ignore and set at naught the power so expressly reserved by the United States to accomplish its ends; unless there be some other act or provision of Congress operating directly to modify or give other effect to that method.

Gibson vs Choteau, 80 U. S. 92
United States vs. Rickert, 188 U. S. 432;
Smith vs Stevens, 10 Wall. 321;
Mungosah vs. Steinbrook, 3 Dill. 418;
McCulloch vs. Maryland 4 Wheat. 316;

where Chief Justice Marshall said,

> "The states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government".

Farrington vs. Wilson 29 Wis. 383;

which was a case considered by the Supreme Court of Wisconsin wherein recovery of possession was sought of lands patented to one Antoine Grignon, an Indian, with a similar restriction of the power of alienation. The defense was that Grignon had conveyed, though without the Presidents' consent, and that the plaintiff had been cut off by a tax deed. The court through Chief Justice Dixon say:

"The validity of the restriction found in the treaty and contained in the patent of the land by the United States to Antoine Grignon "not to be leased or sold by the grantee to any person or persons whatever without the permission of the President of the United States" is unquestionable. The law on this subject is thus summed up by the Supreme Court of the United States in a recent case. (Gibson vs. Choteau, 80 U. S. 92.) With respect to the public domain the costitution vests in Congress the power of disposition and of making all needful rules and regulations. *That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it and to designate the person to whom the transfer shall be made.* No state legislation can interfere with this right or embarass its exercise, and to prevent the possibility of any attempted interference, a provision has been usually inserted in the compacts by which the new states have been admitted to the union, that such interference with the primary disposal of the soil of the United States shall never be made". * * * * * *

For the same reason that lands allotted to Indians, inalienable for certain periods of time or except upon condition, which are instrumentalities lawfully employed by the nation in the exercise of its powers of government to provide, support and instruct the Indians are exempt from taxation by any state or county during the period of the trust; it has been held that the proceeds of the sales of such allotted lands, by the Indian heirs of the allottees, deposited by direction of the Secretary of the Interior, in a bank to the credit of the heirs, subject to their check only when approved by the Indian Agent or officer in charge, are held in trust by the United States for the same purposes as were the lands, and are exempt from taxation by any State or County.

United States vs. Thurston County 143 Fed. 287 (C. C. A.)

This principle, that the operations of the constitutional laws enacted by Congress cannot be controlled by state legislation, applies as well to the courts of the several states and to the federal courts.

Bagnell ys. Broderick 13 Peters. 436;
Wilcox vs. Jackson, 13 Peters 498;
Gile vs. Hallock 33 Wis. 523;

In the latter case the point involved was an execution levy on lands secured from the United States under the "Homestead Act" wherein the exemption from seizure and sale for antecedent debts is greater than that allowed under the state law. The court speaking through Chief Justice Dixon say:

> "Congress is to judge and determine for itself what may and may not be a needful rule or regulation in the premises, and such judgment having been exercised and rules and regulations made, it is not for the courts to overrule its determination. This principle in the interpretation of written constitutions is well settled and there seems to be no room to doubt its application to the clause in question. If, therefore, when providing for the disposition of the public lands and territory belonging to the United States, Congress deemed it advisable and necessary in furtherance of that object to declare such exemption, the validity of such regulation is not the proper subject of judicial criticism or examination. The necessity for the regulation rests in the discretion of Congress, and its decision is conclusive in all other places and before all judicial tribunals. The enactment becomes the supreme law of the land and the judges in every state are bound by it."
>
> See also Hitchcock vs. United States,
> ex rel "Bigboy" 22 App. Dist. Col. 275;
> known as "The Bigboy Case."

where the Court say:

> "but when the United States as guardian of the Indians collectively and individually, seeks to secure specified property to them in such manner as they shall not improvidently squander it, we see no

> reason why the United States may not limit their own grant as they see proper. *We see no reason why they might not have done so with white settlers on the national domain, if they had deemed it expedient to do so.* (italics ours)

But it will be urged that this argument, if of force, has application only by reason of the fact that plaintiff in error is a minor, and necessarily any action in his behalf must be instituted and prosecuted with the sanction of the court acquiring jurisdiction, by reason of his minority, over his property and estate; and that if plaintiff in error were an adult, then no state court would be seeking to interfere with the method the United States adopted for securing to him his allotment and the benefit of it, and that his proceeding in the federal court would contravene no inhibition of congress. This seems to us to be sufficiently answered by the constitutional provision above quoted ("The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.")

We have seen that the Treaty of 1854 is the origin of the title of plaintiff in error; that by the act of Congress of 1901, supra, Congress enlarged and extended the scope and effect of that Treaty to include a class of Indians, of which plaintiff in error, is one; and that it was there enacted that such allotments shall be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third article of that Treaty; that the third article of the Treaty provided that the President shall in causing patents of the lands to issue, impose therein such restrictions on alienation as he may see fit.

Congress has thus given an expression of its power. It has reposed in the executive branch of the government a discretion and an authority and a judgment to be exercised over a subject of which it is supreme; and by the exercise of that discretion and authority the executive

has but done the will of that supreme power. How then, can the courts overrule the determination of congress or control the exercise of that executive discretion?

With regard to the judicial power in cases of this kind, it has been the settled doctrine of this court from the earliest times that there is a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been; but with respect to ministerial duties an act or refusal to act is, or may become, the subject of review by the courts.

Marbury vs. Madison 1 Cranch 137;
Decatur vs. Paulding 14 Peters 497;
Brashear vs. Mason 6 How. 92;
Kendall vs. the United States, 12 Peters 524;
United States vs. Edmunds 5 Wall. 563;
United States vs. Schurz, 102 U. S. 378;
United States vs. Raum, 135 U. S. 200;
Noble vs. Union River Logging R. Co., 147 U. S. 165;
West vs. Hitchcock 205 U. S. 80-85.

Can it be sucessfully contended that this plaintiff in error could have proceeded by mandamus against the President and compelled the issuance to him of a patent to this allotment without restriction on alienation; or if having accepted a patent, as in this case, containing such restrictions, could he by mandamus compel the President to yield consent to his sale of said lands or of an interest therein, as the timber standing thereon; or could he, properly gaining such consent,so compel the removal or withdrawal of a condition annexed to that consent?

That the acts of the President in assigning to individual Indians specific portions of the Reservation,–in patenting lands to allottees,–in imposing restrictions on

alienation,–and in removing those restrictions, do involve the exercise of judgment and discretion and are not ministerial acts seem on their face incontrovertible.

Hitchcock vs. United States ex rel "Bigboy" supra.

Bigboy was a member of this same band of Bad River Indians to which plaintiff in error belongs. His timber was sold to the same person by a contract of the same form, upon the same consent, and upon the same condition, that the proceeds thereof be deposited with the Indian Agent in trust for him, as in the case of plaintiff in error. Bigboy brought an action against the Secretary of the Interior and the Commissioner of Indian Affairs to compel, by mandamus, the payment to him of the moneys so held in trust and the court there said:

> "The very structure of the petition in the case implies that the action sought to be controlled is one of administrative propriety, involving judicial discretion rather than a merely ministerial duty."

The determination of that question necessarily determines the issues herein; for can it be said that any limitation was placed on the exercise of that discretion, or that at any stage that discretion was exhausted? Granting that the President had authority for his acts, his jurisdiction does not depend upon his decision being right.

West vs. Hitchcock supra.

It must follow, therefore, that the creation of a trust of the funds derived from the sale of the allotment of plaintiff in error, or of a specific interest therein, as the timber standing thereon, for his benefit, as the result of the exercise of such power of congress and the judgment and discretion of the executive cannot be challenged, and is beyond the criticism of any court; and that no court has the power to give the effect by its decree that that trust be executed.

## A DISCUSSION OF THE QUESTION FROM THE STANDPOINT THAT THE FEDERAL GOVERNMENT IS EXERCISING GUARDIANSHIP OF THE INDIANS' PROPERTY.

What has been said thus far has tended mainly to a discussion of the title of plaintiff in error, its derivation, and the effect to be given it, but it is well to consider the reasons and considerations of policy which moved the federal government in stipulating in the Treaty that the lands should be patented to the allottees, but with such restrictions on alienation as the President might see fit to impose, and again in causing the allotments to be inalienable without the President's consent, and further in reserving the control of the proceeds of sales of timber and restricting payment to the allottees entitled thereto.

In dealing with the Indians it has ever been the policy and manifest purpose of the Federal government to hold or reserve control of the instrumentalities employed by it in the lawful exercise of its powers of government to protect, support and instruct the Indians. The lands allotted or granted to Indians have been one of the principal instrumentalities of the Federal government in discharging its duty as guardian of the Indians.

United States vs. Rickert, supra;
United States vs. Thurston County, supra.

And it has been its policy throughout in negotiating treaties with Indian tribes and in enacting legislation for the benefit of the Indians to provide restrictions on alienation of lands donated to them of greater or less stringency and sometimes in varying form and duration.

The purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors.

Goudy vs. Meath 203 U. S. 146;
United States vs. Thurston County, supra

The Indians have ever been the wards of the United States, and how the guardian's care and duty shall be exercised is a political question and it is not the province of the courts to intrude upon the domain committed by the constitution to the political department of the government or in effect determine questions of mere governmental policy.

Cherokee Nation vs. Georgia, 5 Peters, 1;
Worcester vs. Georgia 6 Peters 515;
United States vs. Kagama 118 U. S. 375;
The New York Indians 5 Wall, 761;
The Kansas Indians 5 Wall 737;
Cherokee Nation vs. Hitchcock 187 U. S. 294;
Lone Wolf vs. Hitchcock, 187 U. S. 553;
Beecher vs. Wetherby 95 U. S. 517;
United States vs. Holliday 3 Wall. 407;
West vs. Hitchcock 205 U. S. 80-85 decided at the Oct. 1906 term.

To hold otherwise would produce great confusion and would transfer from the department of the Interior to the courts most of the controversies relating to Indian affairs, now properly disposed of by it.

United States vs. Boyd 83 Fed. Rep 547;
Bem-Way-Bin-Ness vs. Eshelby 87 Minn. 108.

The Indians are the wards of the nation and are not wards of the court. The power which now speaks for them is the legislative power of the United States,

Brown vs. United States 32 Ct. Claims 432 (1897)

In United States vs. Kagama, supra, where the defendant, an Indian, was indicted for the murder of another Indian on a reservation in California, the court say in discussing the relations of the Federal government and the Indians;

> "From their very weakness and helplessness so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of

> protection and with it the power. This has always been recognized by the executive and by Congress and by this court whenever the question has arisen. * * * * * it must exist in that government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, and because it has never been denied, and because it alone can enforce its laws on all the tribes.

Authorities may be multiplied showing that the federal government is supreme in all matters relating to Indians, over which it still maintains its guardianship; and consequently that state governments and courts cannot usurp that control or jurisdiction.

It is not left to the Indian to withdraw himself or his property from the guardianship and control of the the United States. When a tribe of Indians is placed under the charge of an Indian Agent by treaty or otherwise, each member of such tribe is under the charge of such agent, within the purview of Section 2139 R. S. and no member thereof can dissolve his tribal relation or escape such charge by absenting himself from such reservation, or otherwise, without the consent of the United States.

> United States vs. Earl 17 Fed. Rep. 75 (C. C. Ore.)
>
> Farrell vs. United States 110 Fed. Rep. 942 (C. C. A.)
>
> Regulations of the Indian Office 1904 Sec. 107; United States vs. Holliday, supra.

This latter case was a prosecution under R. S. 2139 for selling liquor to an Indian who had removed from the reservation and claimed to have severed connection with his tribe, and he had voted at county and town elections in Michigan as he was authorized to do by the laws of that state. The Indian received an annuity under a treaty with the United States and was represented in that matter by the chiefs or head men of his tribe, which

was under an Indian superintendent. Involved in that case were the constitution and laws of Michigan withdrawing that tribe of Indians from the laws of the United States regarding the sale of liquor to Indians. The Court say,—

> "In reference to all matters of this kind (the decision of the Secretary of the Interior and Commissioner of Indian Affairs that tribal organizations should be preserved for any purpose) it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe this court must do the same. If they are a tribe of Indians, then by the constitution of the United States they are placed for certain purposes within the control of the laws of Congress."

See also United States vs. Boyd supra;

State of Minnesota vs. Campbell, 53 Minn. 354.

And it is said in Lowe vs. United States 37 Ct. Claims 413 (1902,)

> "The United States having the exclusive guardianship of the Indian, that guardianship exists in law so long as it is not renounced or disavowed upon the part of the guardian. It is not within the power or caprice of the ward to terminate the relation." * * *

Up to the time of the passage of the Dawes Act 24 Stats. 389, 1887, the Indians were certainly wards of the nation, both as to person and estate.

Lone Wolf vs, Hitchcock 187 U. S. 553;

United States vs. Kagama, supra.

It is uncontroverted that ever since the passage of the Dawes Act the government has assumed to act as the guardian of the property of the Indians (that is, of property of Indians situated as is this one under consideration,) and that the government has thus given us a practical construction of the Dawes Act as understood by the President and the Department of the Interior.

The Department has proceeded on the theory that all guardianship included the two functions, that of guardianship of the person and guardianship of the property, or, as it is expressed in the civil law, of tutor and curator

1 Blackst. Com. 46;

Sec. 3964 R. S. Wis.

And it seems to be clear that the federal government may continue as to its former wards any part of the system of pupilage which had theretofore obtained, until specifically renounced or disavowed..

This court has held

In re Heff 197 U. S. 488,

that the Dawes Act operated as a renunciation of the function of tutor, or guardian of the person, on the part of the United States, to the extent that Indians in the classes described therein have been freed from police regulation on the part of the federal government.

See McKay vs. Kalyton 204 U. S. 458-467.

The phraseology of the Act indicates that this distinction was contemplated by congress, inasmuch as the Act confers upon the Indian "all the rights, privileges and immunities "of citizens, but provides that this change in the Indians' status shall be brought about "without in any manner impairing or *otherwise affecting* the right of any such Indian to tribal *or other* property." That is, to say, the relation of the Indian to property, tribal or otherwise, is and is to remain the same as though the Dawes Act had never been passed.

But it has never been held, either by the executive or judiciary, that the government has renounced its function of curator, that is guardianship of property circumstanced as is the property in controversy.

On the other hand the supreme court of the United States has expressly held that Indians circumstanced as is plaintiff in error "are yet wards of the nation in a condition of pupilage or dependency and have not been discharged from that condition;" and that in spite of the

Dawes Act lands allotted to the Indians with power of alienation conditioned upon the consent of the President, in that case for twenty-five years and in this case indefinitely "are held by the United States for the period * * * in trust for the Indians, such trust being an agency for the exercise of a federal power and therefore outside the province of state or territorial authority"

United States vs. Rickert, supra;
West vs. Hitchcock 205 U. S. 80-85.

And in the Heff case at page 509 a sharp distinction is drawn between civil and political rights, which are reached by the Dawes Act and "mere property rights which are not.

See also United States vs. Rickert, supra,
Cherokee Nation vs. Hitchcock, supra.
McKay vs. Kalyton, supra.

The question arises here then has the government of the United States in imposing a restriction upon alienation and in removing that restriction upon a condition imposed by it, and in holding and retaining the proceeds arising from the sale of the timber been guilty of usurpation?

Inasmuch as it must be conceded that the federal government is still acting as curator of this Indian's property, ie. guardian of his property, and that its acts in relation thereto are subject to no limitation or control, it must follow that it was competent for the government to create a trust in itself, by transforming or causing to be transformed the property given the Indian into a fund to be held by it and its officers, for the benefit of that Indian.

Tomkins vs. Campbell, 129 Wis. 93.

This was an action brought against Campbell, the defendant in error in this suit, as the Indian Agent having supervision of the Bad River Reservation, for the recovery of moneys held in trust by him arising from the sale of the timber of one Sailor an allottee on the Bad River Re-

servation. Such timber was sold under the same consent granted to the plaintiff in error herein and was made upon precisely the same condition, that the money arising therefrom should be held in trust by the Indian Agent.

The Court in that case say:

> "The simple question presented is whether Sailor has absolute control and power of disposition over the money received by the Indian Agent in payment for the timber cut from Sailor's allotment of land, or whether his power of disposition is limited and subject to the approval of the Indian Agent." * * * *
>
> "While it must be admitted that the Indian allottee under the circumstances stated has become a citizen, it does not follow therefrom that the government has thereby thrown aside all the barriers and restrictions which it had so carefully erected to protect him from his natural improvidence. Notwithstanding he was a citizen, the government in dealing with him and granting him rights of property could, if it chose, surround those rights with safeguards or limitations intended for his own welfare and to prevent his squandering his property.
>
> The treaty of 1854 clearly contemplates that his ownership of land shall be subject to substantial restrictions upon the right of alienation, and these restrictions were carried into the patent issued long after the passage of the Dawes act, by provisions which deprived him of the power of alienation in any manner without the consent of the President. These restrictions upon alienation of the land, so industriously inserted in the patent, must be borne in mind when considering the intent of the government in its regulations as to the sale of the timber and the disposition of the proceeds. So, also, the pre-existing relations of guardianship which the government has always maintained toward the Indian must be kept in view.
>
> In view of these considerations, what is the natural meaning of the provisions of the contract,

that the money for the timber is to be paid to the Indian agent in trust for the Indian, and that it is to be deposited in bank by him subject to the check of the Indian countersigned by the agent? To our minds these provisions can not be construed as meaning that the government intended to abolish the safeguards which it erected to guard against the Indian's improvidence, but rather that it intended to place the proceeds of the land practically in the same position as the land itself, namely, subject to disposition only by the Indian when such disposition is approved by the government acting through its Indian agent, instead of through the President. There is clearly no reason why the Indian should be prevented from selling or alienating his land, and should be given free disposal of the moneys arising from the sale of the timber thereon, which doubtless constituted the princ ipal part of its value. On the contrary, there is every reason why there should be substantially the same restrictions upon the disposal of his money as upon the disposal of his land.

In view of these considerations we find no difficulty in construing the provisions of the contract and rules above referred to as meaning that the Indian's power of disposition of the money received from the sale of his timber is subject to the approval of the agent, and hence that the the plaintiff can not recover.

To which is cited: "The Bigboy Case" supra and United States vs. Thurston Co. supra.

By the opinion of the Circuit Judge in the case at bar in the court below (Printed Record P. 12) it was there said "In view of the power given to the President by the treaty and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department, and is held in trust by the United States for the plaintiff's benefit."

Therefore, it would seem that on the proposition

that the Federal government has ever maintained and still retains guardianship of the property of the Indians, a province which is solely occupied by the legislative and executive departments of the government, that no court has the power by its decree to say that that relationship shall cease or has ceased,

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## WHAT BEARING HAS THE CITIZENSHIP OF THE INDIAN UPON THE QUESTION?

Intimately concerned with the discussion of the previous questions is that of citizenship. It is said that "citizenship.' conferred upon the Indian has *ipso facto* dissolved all those preexisting relations between the Federal government as guardian of the person and property of the Indians, and the Indians as wards of the nation; that it is an emancipation from that bondage which they have long been under, and is the key by which those shackles are cast off.

To what extent this is so is concretely the question we have been given the privilege to examine. Without the entrance of "citizenship" into the field of debate,– its purpose, scope and reach,– this suit would never have been brought.

What is "citizenship?" As an ancient writer has expressed it, it is; "where there is one common law there is likewise a common right, and those who hold these in common are to be esteemed, as it were, fellow citizens." Citizenship is thus a civil and political status. Under our system persons admitted to that status become constitutent members of the sovereignty, and perforce possess equal "rights, privileges and immunities."

Necessarily those rights, etc. cannot be, as between one and his fellow citizens, other than relatively or reciprocally equal. What is the proper balance, and when is it maintained?

As says Montesquieu,

> "The true spirit of equality does not imply that every body should command, or that no one should be commanded, but that we obey or command our equals. It endeavors not to shake off the authority of a master but that its masters should be none but its equals."
>
> Spirit of Laws Vol. 1 P. 128

Granting it to be true that plaintiff in error is a citizen of the state of Wisconsin by virtue of the Dawes Act wherein is the equality of those "rights, privileges and immunities" guaranteed to him being denied, and does such determination of his civil and political status resolve the questions raised in this suit in his favor? For the answer we must look to that act fixing the Indian's status. The act must be construed together as a whole. In and by it express provision is made for allotting the reservation lands, the title whereof shall remain and be held by the United States in trust for the allottees for a definite period, and in and by it it is declared (24 Stats. at L. 388)

> "Sec. 6.That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the state or territory in which they may reside. * * * * * And every Indian born within the territorial limits of the United States to whom allotments shall have been made under provision of this act, or under any law or treaty, * * * * * is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens, * * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The logic of the argument of plaintiff in error is that though by the act a trust for the allottee Indians is de-

clared, yet that that trust is in the same breath executed.

Beck vs. Flournoy 65 Fed. Rep. 30.

Was such a result within the contemplation of Congress? Provision was there made for the present and future welfare of the Indians by the sole authority over them and then charged with that duty; such provision was made in a manner similar to that theretofore employed in the discharge of its duty and guardianship; and as a matter of fact it has continued,—that is, it has retained its guardianship of this class of property given by it to the Indians and in regard to which it reserved control. How this can be construed as a violation of any right, privilege or immunity of the nascent citizen is incomprehensible.

## "CITIZENSHIP" AS VIEWED BY THE "HEFF CASE" AND OTHERS.

Citizenship of Indians seems to have taken on in the minds of some a new significance since the decision of this court In re Heff 197 U. S. 488, but it is difficult to perceive how a case involving only the question whether certain classes of Indians are subject to police regulation by the Federal government can be considered an authority for the proposition that the continued exercise of supervision by the Federal government of the Indians' property is unjustified where that property is wholly derived from the Federal government, conditioned upon its supervision. Whatever may be read between the lines of the Heff case it is authority for nothing more than this; that the civil and political status of Indian allottees was fixed by the act of 1887; and that the police regulations of the United States with reference to the sale of liquor to the Indians are without force to control the acts of an allottee Indian who has become a citizen of Kansas, outside of the reservation.

Involved in the discussion of "civil and political status" is the proposition and for which the case stands

an authority, that the guardianship of the person of the Indian may be relinquished by the Federal government without relinquishing the guardianship or trusteeship of his property.

It is there said, P. 509;

> "This emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

The court of appeals of the District of Columbia in the "Bigboy" case supra, well said,

> We are unable to see what part the fact of the citizenship of the relator performs in the present case. He might well be a citizen, with all the rights and privileges of citizens, and yet be disqualified from the exercise of absolute ownership over certain specified property. If it be conceded that among the rights of citizenship is that of freely acquiring, holding, and disposing of property, yet it does not follow that the grantor of property may not place restrictions upon its use by the grantee or person for whose benefit it is granted. It is of daily experience that, in the matter of wills, marriage settlements, deeds in trust, and other similar arrangements, property is tied up and the right of alienation and disposal of it is restricted; and yet it has never been supposed that thereby the right of citizenship of the grantee or beneficiary is impaired. The provision made in the present and other similar cases, for those who are or have been wards of the Government of the United States, are analogous to ordinary trusts wherein it is sought, by restricting the right of disposition, to guard the beneficiaries against the results of their own improvidence; and we fail to find in either any impairment of the right of citizenship. * * * * *The matter of citizenship is an entirely extraneous thing, and has nothing whatever to do with the case*" (Italics ours.)

The United States Court of Appeals for the Eighth Circuit in the case of the United States vs. Thurston County, supra, say, at P. 288;

> "Their civil and political status, however, does not condition the power, authority or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit."

To which is cited,

In Re Heff, supra;

Buster vs. Wright, 135 Fed. Rep. 947 (C. C. A.)

Wallace vs. Adams, 143 Fed. Rep. 716 (C. C. A.)

As was said by Mr. Justice Brewer in the Heff case,

> "Of late years a new policy has found expression in the Legislation of Congress,–a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes free from national guardianship, and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt, It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the Courts to overrule the judgment of Congress."

The determination of who are citizens is a political or legislative question and not a judicial one.

Wallace vs. Adams, supra,

Has Congress, however, in view of the legislation on the subject, determined when and how that relationship of guardianship shall be abandoned as respects the

the property derived from it. or that it has been abandoned? This plaintiff in error did not obtain his patent by virtue of the Dawes Act, and if there were any force in in his contention it would be neutralized by the act of Congress of 1901 (31 Stats. at Large P. 766) on the specific authority of which the plaintiff in error acquired his allotment, subject in all respects to the restriction on alienation lawfully imposed by virtue of the third article of the Treaty of 1854. This is the latest expression of Congress with reference to the relation of guardianship over the property of plaintiff in error. It is idle to say that this plaintiff in error has been emancipated by the act of 1887 from the control or guardianship of the United States so far as his property rights are concerned, where the control of the disposition of those property rights is expressly reserved by the guardian, notwithstanding he may be a "citizen" in a civil and political sense.

## THERE IS NO QUESTION OF RIGHT INVOLVED.

It will be noted that there is no question of the right of a citizen constitutional or otherwise, involved in this case.

It is a mere question whether the fund arising from the sale of this timber shall be kept and administered by the curator appointed by the United States government or by a guardian appointed by the county court of Ashland County, Wisconsin.

This certainly does not involve any constitutional right, for the reason that the 4th subdivision of section 31 of Article IV. of the constitution of Wisconsin, as it it now stands by virtue of amendment, works a prohibition upon the legislature of Wisconsin only, and no law passed by that legislature is involved.

The case does not involve a question of general rights,

for the reason, as above stated, that the control of estates of infants and incompetent persons is a matter of governmental power, and may be exercised by the sovereignty in any way that it sees fit, and not necessarily through the judiciary; and that "the general superintendence and protective jurisdiction of the court of chancery over the persons and property of infants is a delegation of the rights and duties of the crown,–" that is to say, of the sovereign.

2nd Story's Comm. Eq. 565.

And as Senator Verplanck in Cochrane vs. Van Surlay, 20 Wend. 365-380,

says:

> "The same power then which the sovereign authority has a right to delegate generally it may certainly exercise specially in the discretion of its officers; for the *authority is not judicial, but rather parental or tutelary.*"

The sole question raised by this case then is one of convenience, or rather, one of preference.

Congress in the Dawes Act expressly provided that the grant of citizenship to the Indian allottee should not affect his right to tribal or other property.

This would seem to reserve to the government a plenary control over these rights; *a fortiori* is there reserved to the government control over mere matters of management, that is safeguarding moneys where no right is impaired, infringed or in any way affected.

Viewing the matter from the standpoint of the Indians' welfare, there can be no question but that the care of these funds by the Indian agent is highly beneficial to the Indian; and that his welfare will be much better conserved than by placing the fund in the hands of a guardian appointed by a minor state court.

At any rate, the Department has so decided, and we claim has been wise in its decision.

The supreme court of Wisconsin has absolutely endorsed these views in the case of

Tomkins vs. Campbell, above cited.

And the case presented here is on all fours with that case inasmuch as the guardian, by bringing this action, has necessarily ratified and based his rights upon the contract of the minor, even though such contract might have been theretofore voidable. So that, for the purposes of this case, the right urged here is no higher than the right urged in the Wisconsin case. And the consideration urged here in favor of the plaintiff is much weaker, since it is simply the contention that a guardian appointed by a Wisconsin court can administer and care for this fund during the minority of his ward better than the Indian agent, who has been designated by the government by reason of qualifications which his experience with Indian affairs has brought to him.

In concluding we call attention to the case in this court of United States vs. Paine Lumber Co., 206 U. S. 467 decided May 27. 1907, which it will be argued is decisive of the questions herein.

This case does not conflict with the views herein expressed.

In that case the timber had been purchased from the Indian allottees and a fair price had been paid to them therefor. The United States undertook to compel the defendant to pay this price over again to the government; and the action proceeded upon a complaint in which it was alleged that the United States was the owner of the land and of the timber; and the right of the government was predicated upon absolute ownership, unqualified by any trust.

The sentence in the opinion: "The land is not the land of the United States, and the timber, when cut, did not become the property of the United States." is a complete answer to the right set up in the complaint, and

disposes of the case. The only, question involved was that of the title of the Indians.

Neither in that action, nor in its dealings with the Indians therein referred to, had the United States attempted to exercise or in any way exercised guardianship of their estate. The action was not brought by the government as such guardian, nor was it brought for the benefit of those Indians in any way, nor was any question of "citizenship" involved. The question presented here therefore did not and could not arise in that case, and consequently could not be decided, nor can the opinion in that case be taken to bear upon the questions presented here.

Under the treaty which governed in that case the allottees became the owners of the land, and the government retained merely the naked legal title, with all beneficial ownership in the Indians.

Apart from any technical question of law, it would have been manifestly unjust to compel payment over again to the United States of the purchase price which had already been paid to the beneficial owners of the thing sold, particularly where the payment had been made by reason of the total failure of the government to exercise any supervision of the matter by way of guardianship of the proceeds of such sales or otherwise.

And upon technical as well as substantial grounds, the government could not have recovered, since the title declared upon was that of an owner, whereas the title which existed, if any was that of a mere naked trustee of the title, unaccompanied by any acts on the part of the government which showed or tended to show that it was any more, or claimed to be any more, than a passive trustee.

Therefore, in conclusion, we respectfully submit that the demurrer was rightly sustained by the lower court on the grounds, namely,

1. That the restriction of alienation was lawfully imposed and is a condition of title, and that it was competent for Congress and the executive to extend that restriction to the proceeds of the sale of an interest in that allotment, as standing timber.

2. That independently, the government has been the guardian of the Indians of which plaintiff in error is one, and that it is still in the exercise of that guardianship, and that it has not renounced or disavowed it.

3. And that though citizenship has been conferred upon the Indians and on this plaintiff in error, such continued guardianship of the property of plaintiff in error by the United States is no invasion or infringement of his rights and privileges as such citizen, and that no "right" or "rights" of plaintiff in error are involved.

CHARLES QUARLES,

FRANCIS H. De GROAT,

As Amici Curiae.